

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF THE TWIN FALLS)	FINAL
GROUND WATER MANAGEMENT)	ORDER EXTENDING
AREA MORATORIUM)	MORATORIUM
_____)	

On January 11, 1984, the Director of the Idaho Department of Water Resources (“IDWR” or “Department”) designated an area in Twin Falls and Jerome Counties as the Twin Falls Ground Water Management Area (“TFGWMA”) pursuant to Idaho Code § 42-233b. The Department created the TFGWMA because the artesian pressure in the thermal (low temperature) ground water aquifer underlying the TFGWMA was declining.

On July 24, 1987, the Director of the Department established a five (5) year moratorium for a portion of the TFGWMA prohibiting approval of applications to appropriate water and limiting development under existing permits to divert and use water from the artesian, thermal ground water aquifer. The Twin Falls Moratorium Area is that portion of the TFGWMA lying within Townships 9 and 10 South and Ranges 16, 17, and 18 East, Boise Meridian. The Department issued the moratorium order because the artesian pressure in the low temperature geothermal aquifer continued to decline.

The Department extended the five-year moratorium for additional five-year periods through June 2007.

On June 12, 2007, the College of Southern Idaho filed a petition seeking extension of the moratorium for an additional five-year period.

On July 26, 2007, the Director of the Department issued an *Order Extending Moratorium*. The order stated that petitions for reconsideration of the order or requests for a hearing regarding the *Order Extending Moratorium* must be received on or before August 31, 2007.

On August 30, 2007, the Department received a *Petition for Reconsideration and Exception* from Larry Anderson (“Anderson”), represented by C. Tom Arkoosh, Attorney at Law.

PETITION FOR RECONSIDERATION

Statement of Issues

Anderson contests the *Order Extending Moratorium* by raising the following issues:

1. The designated ground water management area does not qualify within the terms of Idaho Code § 42-233b.
2. No permits are required in a ground water management area for a domestic use, and a domestic use “qualifies for exemption.”

Analysis of Issues

Designation of a Ground Water Management Area

Idaho Code § 42-233b defines a ground water management area:

“Ground water management area” is defined as any ground water basin or designated part thereof which the director of the department of water resources has determined may be approaching the conditions of a critical ground water area.

Idaho Code § 42-233a defines a critical ground water area:

“Critical ground water area” is defined as any ground water basin, or designated part thereof, not having sufficient ground water to provide a reasonably safe-supply for irrigation of cultivated lands, or other uses in the basin at the then current rates of withdrawal, or rates of withdrawal projected by consideration of valid and outstanding applications and permits, as may be determined and designated, from time to time, by the director of the department of water resources.

The Twin Falls Ground Water Management Area was created in 1984 by final order of the Director of the Department. If Anderson wishes to challenge the continuing justification for a ground water management area, he should file a motion to rescind or revoke the 1984 order creating the ground water management area, or pursue some other remedy that would challenge the core justification for the ground water management area. Challenging the justification for the ground water management area by petitioning for reconsideration of the *Order Extending Moratorium* is not appropriate. Nonetheless the Department will consider the petition for reconsideration as a request to reconsider the grounds for ordering an extension of the moratorium.

Grounds for Extending Moratorium

Idaho Code § 42-1805 states, in part:

. . . the director of the department of water resources shall have the following powers and duties:

(7) After notice, to suspend the issuance or further action on permits or applications as necessary to protect existing vested water rights or to ensure compliance with the provisions of chapter 2, title 42, Idaho Code . . .

Idaho Code § 42-233 states, in part:

(1) The right to the use of low temperature geothermal resource of this state shall be acquired by appropriation. The appropriation may be perfected by means of the application, permit and license procedure as provided in this chapter for ground water, provided that low temperature geothermal resources shall be utilized primarily for heat value and secondarily for the value as water. Usage of a low temperature geothermal resource primarily for reasons other than heat value is not a beneficial use of the resource, unless the director of the department of water resources exempts the proposed use. The director may exempt a proposed use if the director finds that the proposed use satisfies the following criteria: (i) there is no feasible alternative use of the resource; (ii) there is no economically viable source of water having a bottom hole temperature of eighty-five (85) degrees or less in a well available; (iii) the exemption is in the public interest.

Idaho Code § 42-226 states, in part:

Prior appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping levels as may be established by the director of the department of water resources as herein provided. In determining a reasonable ground water pumping level or levels, the director of the department of water resources shall consider and protect the thermal and/or artesian pressure values for low temperature geothermal resources and for geothermal resources to the extent that he determines such protection is in the public interest.

The Department and the United States Geological Survey have collected water level and pressure data at three key wells within the TFGWMA for over 20 years. Hydrologic data documents that artesian pressures in wells completed in the low temperature geothermal aquifer, underlying the TFGWMA, show an average decline of 67 feet over the past 20 years. Artesian pressures in the monitoring wells declined 7-8 feet during the most recent moratorium extension period of 2002-2007.

Artesian pressure in the low temperature geothermal aquifer underlying the TFGWMA is declining. The data does not show a trend towards an equilibrium, or balance, in the withdrawals and the recharge to the aquifer, but instead, supports a conclusion that the ground water withdrawals are exceeding the average annual rate of recharge. Artesian pressure in the low temperature geothermal aquifer will continue to decline until ground water withdrawals are balanced with the average annual rate of recharge.

The legislature has instructed the Director, when determining reasonable pumping levels, to protect artesian pressures of low temperature geothermal aquifers if protection is found to be in the public interest.

Existing water right holders rely on the low temperature geothermal aquifer's pressure for delivery of the water to the right holders' beneficial use facilities.

Declines in artesian pressures are not moderating/stabilizing, and it is in the public interest to protect the low temperature geothermal pressures.

Maintaining the artesian pressures in the low temperature geothermal artesian aquifer underlying the TFGWMA will prevent the costly replacement of free flowing wells with pumps and motors. Additional appropriations of water for any purpose, including domestic, will exacerbate the present imbalance between withdrawals and recharge. Declining water levels/pressures may ultimately result in a loss or significant reduction in the continuing availability of the low temperature geothermal resource. In the future, the Director may be required to restrict withdrawals from the aquifer by existing right holders. It is not in the public interest to allow additional, later in time appropriations.

Extension of the moratorium is appropriate.

The Effect of the Moratorium on Domestic Uses

Idaho Code § 42-229 states:

The right to the use of ground water of this state may be acquired only by appropriation. Such appropriation may be perfected by means of the application permit and license procedure as provided in this act; provided, however, that in the event an appropriation has been commenced by diversion and application to beneficial use prior to the effective date of this act it may be perfected under such method of appropriation. All proceedings commenced prior to the effective date of this act for the acquisition of rights to the use of ground water under the provisions of sections 42-201 – 42-225, Idaho Code, may be completed under the provisions of said sections and rights to the use of ground water may be thereby acquired. But the administration of all rights to the use of ground

water, whenever or however acquired or to be acquired, shall, unless specifically excepted therefrom, be governed by the provisions of this act.

Idaho Code § 42-227 states:

The excavation and opening of wells and the withdrawal of water therefrom for domestic purposes shall not be subject to the permit requirement under section 42-229, Idaho Code; providing such wells and withdrawal devices are subject to inspection by the department of water resources and the department of environmental quality and providing further that the drilling of such wells shall be subject to the licensing provisions of section 42-238, Idaho Code. Rights to ground water for such domestic purposes may be acquired by withdrawal and use.

Idaho Code § 42-229 and Idaho Code § 42-227 were enacted in 1951. Idaho Code § 42-229 was subsequently amended in 1963 and Idaho Code § 42-227 was subsequently amended in 1970, 1978, and 2001.

Idaho Code § 42-111 defines domestic use as follows:

(1) For purposes of sections 42-221, 42-227, 42-230, 42-235, 42-237a, 42-242, 42-243 and 42-1401A, Idaho Code, the phrase "domestic purposes" or "domestic uses" means:

(a) The use of water for homes, organization camps, public campgrounds, livestock and for any other purpose in connection therewith, including irrigation of up to one-half (1/2) acre of land, if the total use is not in excess of thirteen thousand (13,000) gallons per day, or

(b) Any other uses, if the total use does not exceed a diversion rate of four one-hundredths (0.04) cubic feet per second and a diversion volume of twenty-five hundred (2,500) gallons per day.

Idaho Code § 42-233 states in part:

(1) The right to the use of low temperature geothermal resources of this state shall be acquired by appropriation. The appropriation may be perfected by means of the application, permit and license procedure as provided in this chapter for ground water, provided that low temperature geothermal resources shall be utilized primarily for heat value and secondarily for the value as water. Usage of a low temperature geothermal resource primarily for reasons other than heat value is not a beneficial use of the resource, unless the director of the department of water resources exempts the proposed use. The director may exempt a proposed use if the director finds that the proposed use satisfies the following criteria: (i) there is no feasible alternative use of the resource; (ii) there is no economically viable source of water having a bottom hole

temperature of eighty-five (85) degrees or less in a well available; (iii) the exemption is in the public interest.

Idaho Code § 42-233 was enacted in 1987 and amended in 1988.

Idaho Code § 42-229 requires a prospective appropriator of ground water to file an application for and obtain a water right prior to beneficially using water in the state of Idaho. Idaho Code § 42-233 separately and specifically requires a prospective appropriator in the state of Idaho to file an application for and obtain a water right prior to beneficially using low temperature geothermal water in the state of Idaho.

Idaho Code § 42-227 expressly exempts domestic ground water uses, as defined by Idaho Code § 42-111, from the water right filing requirements of Idaho Code § 42-229. Idaho Code § 42-227 does not include an exemption from the requirement under Idaho Code § 42-233 to file an application for permit when appropriating low temperature geothermal water for domestic purposes.

To the extent these statutes may be viewed in conflict, they should be read, so far as reasonably possible, to be construed in harmony with each other. To the extent the statutes deal with a common subject matter, the statute containing the more detailed and specific language relating to a particular matter will prevail. To the extent there is an irreconcilable inconsistency between statutes, the most recent legislative expression will control.

Low temperature geothermal ground water is a subset of the larger ground water resource described by Idaho Code § 42-229. Applying the previously stated principles of statutory construction, Idaho Code § 42-233 defines a process for appropriating low temperature geothermal ground water that is separate from Idaho Code § 42-229. As a result, the requirements of Idaho Code § 42-233 are not subsumed by Idaho Code § 42-229.

Idaho Code § 42-227 exempts only domestic ground water uses proposed under Idaho Code § 42-229. Idaho Code § 42-227 does not exempt prospective appropriators of low temperature geothermal ground water for domestic uses from the application and water right requirements of Idaho Code § 42-233. A domestic ground water right from low temperature geothermal ground water cannot be perfected by beneficial use, but must be established by the filing of an application with the Department and subsequent approval by the Department as a water right.

Idaho Code § 42-1805 (7) authorizes the Director to suspend the issuance of permits or actions on applications to appropriate water as necessary to protect existing water rights. Low temperature geothermal ground water rights must be established by an approved permit, and the Director has the authority to refuse to process applications to appropriate low temperature geothermal water for domestic use.

Idaho Code § 42-235 states in part:

Prior to beginning construction of any well or changing the construction of any well, the driller or well owner shall obtain a permit from the director of the department of water resources to protect the public health, safety and welfare and the environment . . .

Idaho Code § 42-231 states, in part:

It shall likewise be the duty of the director of the department of water resources to control the appropriation and use of the ground water of this state as in this act provided and to do all things reasonably necessary or appropriate to protect the people of the state from depletion of ground water resources contrary to the public policy expressed in this act.

To protect the artesian pressures of the low temperature geothermal aquifer underlying the Twin Falls Moratorium Area, the Director should not approve drilling permits for any purpose in the Twin Falls Moratorium Area, including domestic use, unless the applicant for a drilling permit holds a water right authorizing diversion of low temperature geothermal water from a point of diversion at the proposed well site.

FINDINGS OF FACT

1. Hydrologic data documents that artesian pressures in wells completed in the low temperature geothermal aquifer, located in the TFGWMA show an average decline of 67 feet over the past 20 years. Artesian pressures in the monitoring wells declined an additional 7-8 feet during the most recent moratorium extension period of 2002-2007.
2. Artesian pressure in the low temperature geothermal aquifer underlying the TFGWMA is declining. The data supports a conclusion that the ground water withdrawals are exceeding the average annual rate of recharge.
3. Existing water right holders rely on the low temperature geothermal aquifer's pressure for delivery of the water to the right holders' facilities.
4. The Department has issued drilling permits, both by written approval and by start cards, for domestic uses, as defined by Idaho Code § 42-111, within the Twin Falls Moratorium Area of the TFGWMA. Low temperature geothermal water is diverted from some of the wells constructed under these domestic drilling permits.

CONCLUSIONS OF LAW

1. The legislature has instructed the Director to protect artesian pressures for low temperature geothermal aquifers if protection is in the local public interest.
2. Declines in artesian pressures are not moderating/stabilizing, and it is in the public interest to protect the low temperature geothermal pressures.
3. Extension of the moratorium is appropriate.
4. A domestic ground water right from low temperature geothermal water cannot be perfected by beneficial use, but must be established by the filing of an application with the Department and subsequent approval by the Department as a water right.
5. Low temperature geothermal water rights must be represented by an approved water right, and the Director has the authority to refuse to process applications to appropriate low temperature geothermal water for domestic use.
6. Owners of domestic wells diverting water from the low temperature geothermal aquifer that were constructed prior to this order without a water right should be entitled to seek a water right for the existing domestic use as defined by Idaho Code § 42-111.

ORDER

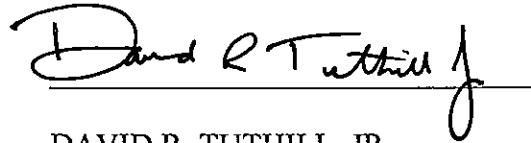
IT IS HEREBY ORDERED, pursuant to Idaho Code § 42-1805(7) and IDAPA Rule 37.03.08055 (Water Appropriation Rule 55), that the order dated July 24, 1987, establishing a moratorium on approval of applications to appropriate and limiting development of existing permits to use the thermal-artesian ground water source in the Twin Falls Moratorium Area **is extended for five (5) years, from the date this order becomes final through April 1, 2013**, unless rescinded or modified by order of the Director or a court of competent jurisdiction.

IT IS FURTHER ORDERED that the moratorium prohibits appropriation of low temperature geothermal water, including the appropriation of low temperature geothermal ground water for “domestic purposes” under Idaho Code § 42-111.

IT IS FURTHER ORDERED that the Department shall not issue drilling permits for domestic purposes as defined by Idaho Code § 42-111, or for any other purpose, to construct a well proposing a production zone within the low temperature geothermal aquifer underlying the Twin Falls Moratorium Area unless the proposed well is described as a point of diversion by a valid, existing water right.

IT IS FURTHER ORDERED that the Department shall process and consider, and may approve, applications to appropriate water for domestic use of low temperature geothermal ground water underlying the Twin Falls Moratorium Area from owners of existing domestic wells whose use satisfies the limitations of Idaho Code § 42-111, if the well was constructed and used prior to the date of this order.

DATED this 17th day of April, 2008.

A handwritten signature in black ink, reading "David R. Tuthill, Jr.", written over a horizontal line.

DAVID R. TUTHILL, JR.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of April, 2008, a true and correct copy of the document(s) described below were served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Final Order Extending Moratorium
Explanatory Information to Accompany a Final Order, without a hearing

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ARNOLD ELSING
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BETASEED INC
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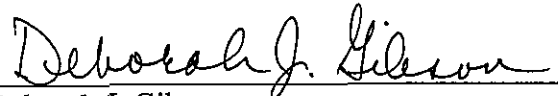
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